IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-831

J. H. TULLY, JR., A. BRUCE MANLEY, MILTON KOERNER, FRANCIS X. MALONEY and JOHN WILLEY, *Appellants*

vs.

GRIFFIN, INC., *Appellee*

On Appeal from the United States District Court for the District of Vermont

BRIEF FOR APPELLEE

JOHN H. WILLIAMS II
Attorney for Appellee

115 Elm Street
Bennington, Vermont 05201

R. PAUL WICKES

WILLIAMS & WICKES
115 Elm Street
Bennington, Vermont 05201

Of Counsel

HADWEN, INC., LAW PRINTERS
BENNINGTON, VERMONT

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

SUPPLEMENTAL STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. 28 U.S.C. §1341, does not require dismissal of this action, because the remedies available to appellee in New York State are not plain, speedy and efficient .. 3

A. New York's statutory tax appeal procedure is inadequate 5

B. No alternative to the statutory proceeding is clearly available to appellee in New York 10

C. Regardless of the remedies available in New York State, appellee should not be required to litigate there 15

II. The district court was correct in granting appellee's motion for preliminary injunction 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES:

Adams County v. *Northern Pac. Ry. Co.*, 115 F.2d 768 (9th Cir. 1940) 13

American Commuters Association v. *Levitt*, 405 F.2d 1148 (2nd Cir. 1969) 9

Ammex Warehouse Co., Inc. v. *Gallman*, 72 Civ. 306, 310, (N.D.N.Y., Mar. 16, 1973), *aff'd mem.*, 414 U.S. 802 (1973) 15

Booth v. *City of New York*, 268 App. Div. 502, 52 N.Y.S. 135 (1944), *aff'd*, 296 N.Y. 573, 68 N.E.2d 870 (1946) ... 11

D.C. Transit Systems v. *Pearson*, 149 F.Supp. 18 (D.D.C. 1957) 4

Denton v. *Carrollton*, 235 F.2d 481 (5th Cir. 1956) 8

Dun & Bradstreet, Inc. v. *City of New York*, 276 N.Y. 198, 11 N.E.2d 728 (1937) 11

First National City Bank v. *New York Finance Administration*, 36 N.Y.2d 87, 365 N.Y.S.2d 493, 324 N.E.2d 861 (1975) 11

Georgia R.R. & Banking Co. v. *Redwine*, 342 U.S. 299 (1952) 4

Hickmann v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973) 10

Hospital Television Systems, Inc. v. *State Tax Commission*, 63 Misc.2d 705, 311 N.Y.S.2d 568 (1970), *aff'd*, 41 App. Div. 2d 576, 339 N.Y.S. 2d 603 (1973) 6, 12

Hudson Transit Lines, Inc. v. *Bragalini*, 11 Misc.2d 1094, 172 N.Y.S.2d 423 (1958) 11

Matthews v. *Rogers*, 284 U.S. 521 (1932) 3

Miller Bros. v. *Maryland*, 347 U.S. 340 (1954) 18

Mutual Life Insurance Co. v. *State Tax Commission*, 24 App. Div. 2d 853, 264 N.Y.S.2d 862 (1965), *aff'd mem.*, 17 N.Y.2d 736, 270 N.Y.S.2d 205, 217 N.E.2d 31 (1966) ... 12

National Bellas Hess v. *Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967) 18

Peters v. *State Tax Commission*, 18 App. Div. 2d 886, 237 N.Y.S.2d 613 (1963), *aff'd mem.*, 13 N.Y.2d 1148, 247 N.Y.S.2d 139, 196 N.E. 2d 568 (1964) 13

Slater v. *Gallman*, 38 N.Y.2d 1, 377 N.Y.S.2d 448, 339 N.E.2d 863 (1975) 11

Socony-Vacuum Oil Co. v. *City of New York*, 247 App. Div. 163, 287 N.Y.S. 288, *aff'd mem.*, 272 N.Y. 668, 5 N.E.2d 385 (1936) 11

Spector Motor Service v. *McLaughlin*, 323 U.S. 101 (1944) 13

Township of Hillsborough v. *Cromwell*, 326 U.S. 620 (1946) 14

United States Steel Corp. v. *Multistate Tax Commission*, 367 F.Supp. 107 (S.D.N.Y. 1973) 5, 7, 16

U.S. v. *Corrick*, 298 U.S. 435 (1936) 17

Yonkers Raceway, Inc. v. *City of Yonkers*, 30 N.Y.2d 913, 335 N.Y.S.2d 568, 287 N.E.2d 274 (1972) 12

Younger v. *Harris*, 401 U.S. 37 (1971) 15

MISCELLANEOUS:

M. Ginsburg, Prepared Statement to the Select Task Force on Court Reorganization, November 20, 1975 6

New York State Bar Association, Tax Section, Annual Report, 1976 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-831

J. H. TULLY, JR., A. BRUCE MANLEY, MILTON KOERNER, FRANCIS X. MALONEY and JOHN WILLEY, *Appellants*

vs.

GRIFFIN, INC., *Appellee*

On Appeal from the United States District Court for the District of Vermont

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Was the district court correct in holding that 28 U.S.C. §1341 does not bar jurisdiction under the circumstances of this case?
2. If the District Court has jurisdiction of this case, did it abuse its discretion in granting a preliminary injunction?

SUPPLEMENTAL STATEMENT OF THE CASE

Appellee is a small Vermont furniture dealer, with total assets at the end of 1974 of less than $260,000.(A.2) It owns no realty and has no place of business in New York. It has no sales agents or similar representatives of any sort in New York. There is no charge made for the occasional "touch-up" services performed in New York. It extends no credit to New York customers. It is not and has never been registered or qualified to do business in New York.(A.26-29)

Appellants are the three members of the New York State Tax Commission, the Director of the Sales Tax Bureau and the Bureau's Senior Tax Examiner. (A.25) Appellee brought this action only after appellants had determined that Appellee was a vendor within the applicable provisions of New York's Sales and Use Tax Law, and had notified appellee of that determination. (A.2) The tax examiners who were sent to appellee's place of business in Vermont were sent not to determine whether or not appellee was required to collect taxes, but to determine the amount of taxes due. (A.26)

After the commencement of this action in the district court, and after appellants had moved to dismiss, they caused to be issued an assessment, showing sales and use taxes due in the amount of $218,085.37. (A.26) It was only the issuance of that assessment which led to appellee's request for preliminary relief, in order to prevent the expiration of appeal times under the New York statute (A.7-9) At the request of the district court, the first assessment was withdrawn in order to eliminate the need for a temporary restraining order. Subsequently, a second assessment of $298,000 was issued. (A.39)

SUMMARY OF ARGUMENT

The district court was correct in determining that 28 U.S.C. §1341 does not require dismissal of this action, because the remedies available in New York State are inadequate to the task of protecting appellee's rights. The statutory tax appeal procedure is unacceptable because it would require appellee to submit to an audit by the New York Tax Department. In addition, it requires a hearing

before a Tax Commission which is not able to decide a constitutional challenge such as the one here presented, and has already determined to impose sales tax liability on appellee. Finally, in the event of an adverse determination by the Tax Commission, appellee would not be able to appeal to the courts because of the extremely burdensome requirements of the statute.

Equitable alternatives to the statutory procedure may well not be available to the appellee, in view of the strong language of the sales tax law, making the statutory remedy the exclusive means of raising even a constitutional challenge to a sales tax assessment.

Appellee should not be required to challenge this exaction in the courts of New York in any event, because doing so will strip appellee of its claims to be immune from jurisdiction in New York. A remedy is hardly plain, speedy and efficient if it requires the surrender of important rights or claims in order to exercise it.

If the district court was correct in deciding not to dismiss the action, its issuance of a preliminary injunction was no more than was required to preserve the *status quo* pending a determination on the merits.

ARGUMENT

I. 28 U.S.C. §1341 does not require dismissal of this action, because the remedies available to appellee in New York State are not plain, speedy and efficient

The provisions of 28 U.S.C.§1341,enacted in 1937, did little more than codify a long-standing principle of equity jurisdiction in the federal courts, established by such earlier cases as *Matthews* v. *Rogers*, 284 U.S. 521 (1932). The principle might best be described as one of restraint with respect to interference in state tax matters. The statute does not prohibit district courts from enjoining state tax proceedings; rather it directs them to inquire whether the remedies available in the taxing state are "plain, speedy and efficient." That inquiry is not made in the abstract, but instead attempts to determine whether the plaintiff has available an alternative to the federal

court which is not unduly burdensome. *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299 (1952).

In *D.C. Transit Systems* v. *Pearson*, 149 F. Supp. 18 (D.D.C. 1957), commenting upon Section 1341 and similar provisions of local law, the district court stated that:

> In spite of the broad, sweeping language of these statutes, it had [sic] been uniformly held that they are but a restatement of the principle that equity will not interfere by injunction with the collection of a tax unless some special or extraordinary circumstance is present,justifying its interposition.... Numerous exceptions to the comprehensive ban against injunctions have been developed by judicial decisions. 149 F. Supp. at 19-20.

It is inaccurate to describe decisions which permit district courts to intervene in state tax matters as "exceptions" to the rule of Section 1341. Where there does not exist in the courts of the taxing state a reasonable remedy available to the specific plaintiff which is "plain, speedy and efficient," recourse to the federal courts *implements* the statute.

The nature of the inquiry to be made by the district court in deciding a motion to dismiss under Section 1341 was illuminated by the District Court for the Southern District of New York in a recent case:

> In determining whether to exercise jurisdiction in a particular case, the Court must carefully weigh two countervailing considerations set forth by...[Section 1341]...:(1) a long standing policy of non-interference by federal courts in state tax matters; and (2) fairness to plaintiffs, *i.e.*, whether plaintiffs have an effective state remedy. The cases construing Section 1341 show that the broad language of the statute has been limited by numerous exceptions. Under the terms of the statute itself, a federal court must decline jurisdiction only when plaintiffs have a plain, speedy and efficient remedy in the state courts. Although the state remedy need not be the best available, its existence will not bar relief where the state remedy is unduly burdensome. The test is whether the state remedy is adequate. (citations omitted) *United States Steel Corp.* v. *Multistate Tax Commission*, 367 F. Supp. 107, 115 (S.D.N.Y. 1973).

The remedies available to appellee are so deficient under principles established by the cases interpreting Section 1341 that the district court was correct in deciding to retain jurisdiction of this case.

A. New York's statutory tax appeal procedure is inadequate

Appellants assert that the procedures set forth in Section 1138 of the New York State Sales and Use Tax law (Appellants' Brief, p. A-5) are plain, speedy and efficient within the meaning of Section 1341. The first step under the statute is an administrative hearing before the State Tax Commission. In a dispute not about the amount of taxes owed, but about the constitutionally permissable reach of New York's taxing authority, the administrative hearing is inadequate to the purpose.

It is plain from the record in this case that the Tax Commissioners who would conduct such a hearing have already decided as a matter of policy to attempt to enforce this tax against appellee:

> The...[appellants, including all of the members of the State Tax Commission]...maintain that...[appellee] is...required to register as a vendor, collect and remit sales taxes on those sales of tangible personal property delivered in New York State, is personally liable for sales tax not collected and remitted, and must allow examination of its records. (Defendants' Memorandum of Law, Record, document number 5, p. 3; *See also* A.12 and A.15).

It seems inappropriate at best to require appellee to go through the charade of an administrative proceeding before a body which has already decided this question against appellee.

This structural unfairness is apparently not unique to

this case. The Tax Section of the New York State Bar Association has said:

> The State Tax Commission, which currently functions as adjudicator, is part of the very Department that assesses the tax and prosecutes the tax case. *New York State Bar Association, Tax Section, Annual Report* 10 (1976).

The Chairman of the Tax Section, in testimony before a Select Task Force on Court reorganization, said:

> I think it is entirely fair to say that the demonstrated characteristics of our present system in New York State, universally perceived, are extreme delay, an extraordinary penchant for unnecessary and undesirable litigation, and gross unfairness and bias in the decisional process. *M. Ginsburg, Prepared Statement to the Select Task Force on Court Reorganization,* November 20, 1975.

Those comments, of course, are addressed to the general case in which the Tax Commission's bias is only the natural one of upholding the department's collection activities. The bias in the present situation is far more pernicious, where the Commission is attempting to extend the reach of its authority and jurisdiction.

Even assuming, however, that the Tax Commission has not predetermined the issues in this case, it is not at all clear that it is competent to hear constitutional issues concerning the reach of its own authority. In *Hospital Television Systems, Inc.* v. *State Tax Commission*, 63 Misc. 2d 705, 311 N.Y.S. 2d 568 (1970), *aff'd*, 41 App. Div. 2d 576, 339 N.Y.S. 2d 603 (1973), the court said, "clearly, a taxpayer could not argue the illegality or constitutionality of a statute before an administrative body," 63 Misc. 2d at 707.

If the Tax Commission cannot determine the constitutional issues which are the basis for appellee's objection to the imposition of these taxes, the only purpose of the administrative hearing can be to determine the amount of taxes which would be owed in the event

appellee's constitutional claim eventually fails. But in order for there to be any real hearing on the issue of the amounts involved, appellee must submit to an audit of its books and records by tax examiners of the New York State Tax Department.

This submission to an audit by an authority which appellee claims has no jurisdiction over it is a serious deficiency posed by the statutory remedy. The court in *United States Steel* v. *Multistate Tax Commission*, cited a similar audit requirement as a separate basis for rejecting a motion to dismiss based on Section 1341:

> The second suggested course of action has another infirmity: because it is unavailable to plaintiffs until after the audits have been conducted, it might cause plaintiffs irreparable injury. Plaintiffs would be required to turn over their books and records to persons whose authority and qualifications they claim are invalid. In cases where irreparable injury would occur if no injunction were to be granted, federal courts will entertain suit. *United States Steel Corp.* v. *Multistate Tax Commission*, 367 F. Supp. 107, 116 (S.D.N.Y. 1973).

Appellee's alternative to submission to the audit is apparently to allow the assessment of $298,580.59 to stand, and to be forced into an all-or-nothing battle on its constitutional defenses. Because of the requirements in Section 1138 of the Sales and Use Tax Law for posting a bond for the payment of taxes as a precondition to judicial appeal from the determination of the tax commission, the pressures on appellee to submit to this audit prior to the Tax Commission hearing would be almost irresistible.

After the proceeding before the Tax Commission, New York's statute provides for an appeal to the state court system. Section 1138, however, requires the taxpayer to "deposit" with the Tax Commission the full amount of the tax assessed, plus interest and penalties, together with a bond sufficient to cover the costs of the proceeding. Alternatively, the taxpayer may post a bond in an amount sufficient to cover the total amount of costs, tax, interest and penalties. In the event of successful appeal, the taxes, interest and penalties are returned with interest, but there

is apparently no provision for repayment by the state of the costs of the bond.

It is perfectly obvious that no corporation with total assets of less than $260,000 could deposit $298,000 with the Tax Commission for an indeterminate period of time. Affidavits submitted by appellee in the district court demonstrate that it is extremely unlikely that the bonding alternative is available. (A.21-24) Therefore, if appellee is required to follow the statutory procedure for contesting the assessment, an appeal from a decision of the Tax Commission is neither plain, speedy nor efficient, but simply unavailable.

The Court of Appeals for the Fifth Circuit reversed a dismissal based upon Section 1341, in *Denton* v. *Carrollton*, 235 F.2d 481 (5th Cir. 1956). Faced with a challenge to a municipal ordinance requiring union organizers to pay a tax of $1,000, plus $100 per day, the Court noted that there was some question about whether the payments could be recovered at all. Even aside from that issue, however, the Court found that the requirement of full payment before challenge took the state remedy out of the plain, speedy and efficient category.

> To require the payment of any such sum as a condition to testing the validity of the exaction, if it does not of itself make the tax illegal for that reason, at least presents such a heavy burden that to decline equitable relief would be to deny judicial relief altogether. 235 F.2d at 485.

The statutory remedy, as it is available to this taxpayer, consists of an administrative hearing before Commissioners who have already decided to impose the tax on appellee, and who are probably not competent to decide appellee's constitutional issues, requiring an audit by an authority whose jurisdiction is contested by appellee, all followed by an appeal to the courts, which because of the statutory deposit or bonding requirements will be unavailable to appellee in any event.

Appellants correctly point out that a substantial body of case law has held refund procedures in general, and New York's in particular, to be adequate. But those cases, and other, similar decisions, are not applicable here because

of a fundamental difference between a sales tax and other kinds of taxes.

The retail store is not, in the first instance, the taxpayer. Rather the retailer is only the collector of the tax, which is actually paid by the retail purchaser. The imposition of secondary liability upon the retailer is merely a means of assuring that the collection function would be fulfilled.

Other taxes, particularly property and income taxes, are imposed upon the individual or entity which is principally liable for the payment of the tax, and collected directly by the taxing authority. Such taxes are measured (at least in theory) by a standard considered to be a fair test of the taxpayer's ability to pay the tax. Thus, for example, it may not be too great a burden to require deposit of income tax assessments prior to judicial review, because the tax is based upon income received by the taxpayer, who therefore has the money available for deposit.

In the present case, however, where the very question in dispute is whether plaintiff is obligated to provide collection services for New York, the deposit burden is substantially greater than it is in income tax or property tax disputes, precisely because the plaintiff has never received or had the benefit of the funds which the state insists it should deposit.

The cases which appellants cite in support of the proposition that the statutory remedies are "adequate" miss the point of Section 1341, for the test is not to be applied in the abstract, and none of the cases cited by appellants is controlling in this particular situation. For example, *American Commuters Association* v. *Levitt*, 405 F.2d 1148 (2nd Cir. 1969) was a challenge, on equal protection grounds, to the imposition of New York's individual income tax upon non-residents employed in New York. Noting that a substantial body of precedent upheld the validity of the tax, the court held that a refund suit was an adequate remedy. Plaintiffs in that case contended that the requirement of a bond to secure court costs was burdensome, but raised no issue of the need to deposit taxes, presumably because the taxes had already been withheld by the plaintiffs' employers.

Hickman v. *Wujick*, 488 F.2d 875 (2nd Cir. 1973) was a

challenge by taxpayers who sought a credit against local property tax payments in an amount equal to tuition they paid to a private school. Dismissal was required because the statutory appeal procedures for property tax assessments, together with the clear availability of declaratory relief to challenge the local tax were found to be acceptable.

While as a general rule it may be permissible for states to require taxpayers to contest assessments from a refund posture, the district court was correct in concluding that, under the circumstances of this case, to deny the intervention of the federal court would be to risk denying appellee any remedy whatever.

B. No alternative to the statutory proceeding is clearly available to appellee in New York

Appellants have asserted at each stage in this proceeding that while the statutory procedures may be inadequate, dismissal is required because a declaratory judgment proceeding in New York courts is clearly available to appellee as an alternative. The district court concluded that the availability of a declaratory judgment proceeding was clouded with such uncertainty that dismissal was not required.

Section 1140 of the Sales and Use Tax Law provides:

> 1140. REMEDIES EXCLUSIVE. The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be *exclusive remedies* available to any person for the review of tax liability imposed by this article; and *no determination or proposed determination* of tax or determination on any application for refund shall be *enjoined or reviewed by an action for declaratory judgment*, an action for money had and received, or by an action or proceeding other than a proceeding under Article seventy-eight of the Civil Practice Law and Rules. (emphasis added)

Despite the extraordinarily clear and emphatic command of that statute, appellants insist that appellee may bring a declaratory judgment proceeding, and cite in

support of that proposition a number of cases in which New York courts have allowed declaratory judgement proceedings in tax contests. Those cases do not stand for a general proposition that any plaintiff may elect to seek declaratory relief instead of following the statutory procedures. They show at most that the courts of New York may, in certain limited circumstances, allow declaratory relief as an alternative to the refund procedures.

Most of the cases cited by appellants in support of their claim that declaratory judgment is available were decided under statutory provisions significantly different from Section 1138. The earliest cases supporting the availability of declaratory relief in New York were decided under the New York City sales tax. For example, *Socony-Vacuum Oil Co.* v. *City of New York*, 247 App. Div. 163, 287 N.Y.S. 288 *aff'd mem.*, 272 N.Y. 668, 5 N.E. 2d 385 (1936), permitted a declaratory judgment action to challenge a regulation promulgated by the Comptroller of the City of New York with respect to the proper treatment for sales tax purposes of Federal and state excise taxes; but the sales tax statute did not state that its remedies were to be exclusive. The court cited "extraordinary circumstances" to justify the declaratory judgment action. 287 N.Y.S. at 292-293. Similarly, *Dun & Bradstreet, Inc.* v. *City of New York*, 276 N.Y.198, 11 N.E. 2d 728 (1937), involved a statute which was silent as to exclusivity.

Hudson Transit Lines, Inc. v. *Bragalini*, 11 Misc. 2d 1094, 172 N.Y.S. 2d 423 (1958) and *Slater* v. *Gallman*, 38 N.Y. 2d 1, 377 N.Y.S. 2d 448, 339 N.E. 2d 863 (1975), were decided under the provisions of Section 199 of the New York Tax law, which provides a remedy stated to be exclusive. But the statute states that the prescribed review procedure shall be followed where it is contended that a tax is "erroneous or illegal," and thus does not speak to the issue of the proper method of review when an exaction is challenged as unconstitutional.

Booth v. *City of New York*, 268 App. Div. 502, 52 N.Y.S. 135 (1944), *aff'd*, 296 N.Y. 573, 68 N.E. 2d 870 (1946); *First National City Bank* v. *New York Finance Administration*, 36 N.Y. 2d 87, 365 N.Y.S. 2d 493, 324

N.E. 2d 861 (1975); and *Yonkers Raceway, Inc.* v. *City of Yonkers*, 30 N.Y. 2d 913, 335 N.Y.S. 2d 568, 287 N.E. 2d 274 (1972), all involved local taxes in which the section of the local tax law which provided for the exclusivity of remedies was not authorized by the enabling statute, and was therefore not enforceable. 268 App. Div. *at* 507.

Unlike all of the statutes involved in the cases cited so far, Section 1138 of the Sales and Use Tax Law specifically provides that the statutory remedy is to be used for constitutional challenges. This change from earlier statutes clearly indicates an attempt by the legislature to prevent the use of declaratory judgement proceedings to make constitutional challenges to tax statutes, and to require even those challenges to follow the statutory process.

The only case cited by appellants for the proposition that a declaratory judgment proceeding will be permitted in the face of the specific provisions of Section 1138 is *Hospital Television Systems, Inc.* v. *State Tax Commission*, 63 Misc. 2d 705, 311 N.Y.S. 2d 568 (1970), *aff'd*, 41 App. Div. 2d 576, 339 N.Y.S. 2d 603 (1973). Although the opinion of the appellate division in that case contains some general language indicating that statutory procedures need not be followed in every case, the specific question before the court did not involve a declaratory judgment, but rather the question of whether a taxpayer who did not contest the amount of taxes alleged to be due, could skip the administrative proceedings and go directly to an Article 78 judicial proceeding.

It is important to note that the New York courts do insist upon strict adherence to the statutory procedures in many circumstances. For example, in *Mutual Life Insurance Co.* v. *State Tax Commission*, 24 App. Div. 2d 853, 264 N.Y.S. 2d 862 (1965), *aff'd mem.*, 17 N.Y. 2d 736, 270 N.Y.S. 2d 205, 217 N.E. 2d 31 (1966), the insurance company brought a declaratory judgment proceeding challenging on constitutional grounds the imposition of certain franchise taxes on insurance premiums paid for the benefit plan operated by the insurance company for its employees. The supreme court granted a motion to dismiss on the grounds that the statute provided an exclusive remedy, and the appellate division and the

Court of Appeals upheld the dismissal. Similarly, in *Peters* v. *State Tax Commission*, 18 App. Div. 2d 886, 237 N.Y.S. 2d 613 (1963), *aff'd mem.*, 13 N.Y. 2d 1148, 247 N.Y.S. 2d 139, 196 N.E. 2d 568 (1964), the appellate division and the Court of Appeals upheld the dismissal of a declaratory injunction proceeding in favor of the statutory tax appeal procedure.

Section 1138 and 1140, taken together, represent an extremely clear statement by the legislature that the remedy set forth in the sales tax statute is to be exclusive, regardless of the nature of the challenge to the tax. In the face of such a strong statutory position, appellants have not demonstrated with any certainty that appellee would not be held to the statutory remedy in order to litigate in New York, and there is, therefore, considerable uncertainty with respect to the availability of equitable alternatives to the statutory remedy in New York State.

Cases in which there is uncertainty as to the availability of equitable alternatives to burdensome statutory procedures have regularly been held to be outside the injunction ban of Section 1341. In *Adams County* v. *Northern Pac. Ry. Co.*, 115 F. 2d 768 (9th Cir. 1940), the court noted that although the state courts had sometimes allowed equitable relief, its availability was not absolutely certain, and concluded:

> If the remedy is doubtful, it does not deprive the federal court of jurisdiction. *Corporation Commission* v. *Cary*, 296 US 452, 453, 56 S.Ct. 300, 80 L.Ed. 324; *Mountain States Power Co.* v. *Public Service Commission of Montana*, 299 U.S. 167, 170, 57 S.Ct. 168, 81 L.Ed. 99; *Driscoll* v. *Edison Co.*, 307 U.S. 104, 110,59 S.Ct. 715, 83 L.Ed. 1134. 115 F. 2d at 775.

This Court, in *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944), a Commerce Clause attack on Connecticut's corporate franchise tax by an interstate trucking company, while reversing on other grounds, upheld the district court's decision to hear the case, because of conflicting Connecticut precedents as to the availability of equitable relief.

This Court held that uncertainty surrounding the availability of adequate remedies permitted the district

court to intervene despite Section 1341 in *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946). In that case, there were conflicting precedents shrouding in uncertainty the availability of appropriate procedures in the state courts, and the uncertainty was sufficient, in the Court's view, to permit the district court to take jurisdiction.

In the face of language as clear as that of Section 1140 the federal courts are not required to speculate about the willingness of New York courts to ignore the statute, particularly when appellants can point to no decision of the highest court of New York which clearly demonstrates that declaratory judgment would be available to appellee despite the exclusivity provision of the statute.

In addition to uncertainty over whether it is available at all, another difficulty with the declaratory judgment proceeding suggested by appellants is the inability of the New York courts to grant injunctive relief. Appellants caused a tax assessment to be issued against appellee after the commencement of this action. Without injunctive relief, under Section 1138 of the Sales and Use Tax Law, at the end of 90 days the assessment becomes final unless the statutory tax appeal procedure is invoked prior to that time. Therefore, in the absence of injunctive relief, appellee may have to attempt to bring a declaratory judgment proceeding in New York State only at the expense of losing forever its right to contest the amount of taxes due, should it be finally determined that its constitutional objections are not controlling.

In support of the proposition that injunctive relief would be available, appellants do no more than set forth the general statutory provisions which grant ordinary equity powers to the New York courts. They cite no authority which holds out even the slightest hope that injunctive relief would be permitted in the face of the clear prohibition against such relief contained in Section 1140.

In order to contend here, for the purpose of demonstrating the adequacy of New York remedies, that injunctive relief would be available in this case, it is incumbent upon appellants to demonstrate that the New York Courts will not enforce the anti-injunction provisions of Section 1140.

C. Regardless of the remedies available in New York State, appellee should not be required to litigate there

Defendants rely heavily upon the decision of a three judge District Court in *Ammex Warehouse Co., Inc.* v. *Galiman*, 72 Civ. 306, 310 (N.D.N.Y., Mar. 16, 1973), *aff'd mem.*, 414 U.S. 802. (1973) The *Ammex* court seems to have considerably overestimated the certainty that declaratory relief would be available, but there is another distinction which makes that decision inapposite here. Ammex operated eight sales facilities in the state of New York. Its claim for tax exemption was based upon the Commerce Clause and the Import-Export Clause, but not upon the Due Process Clause. Since Ammex was physically present and doing business in New York, the burden of requiring it to seek a questionable remedy in the state courts may not have been very harsh. A corporation with such extensive facilities in New York State could reasonable be expected to litigate in New York courts. But to force appellee, which has contacts with New York described by the district court as "minimal", to litigate in New York State is a result which neither Section 1341 nor common sense require.

The policy of restraint embodied in Section 1341 is based upon two separate considerations. One is a reluctance to interfere in the revenue-collecting activities of a state because of the fundamental importance of those activities to state government. It also reflects, however, a more general federal policy of non-interference in the relationship between a state and its citizens, or others over whom the state properly exercises jurisdiction. This general policy, for example, is applied to criminal prosecutions by such cases as *Younger* v. *Harris*, 401 U.S. 37 (1971). But where, as here, the record indicates substantial doubt as to whether New York has jurisdiction over the appellee at all, and this case challenges the tax specifically on due process grounds, there is no good reason to require appellee to pursue dubious remedies in the state courts.

To require appellee to follow either of the procedures suggested by appellants would almost certainly expose

appellee to the full jurisdictional power of the New York state courts, to which appellee might not otherwise be subject.

If appellee's contentions on the merits are sound, it is unlikely that any court in the State of New York has jurisdiction over appellee sufficient to issue an enforceable judgment against it in a suit brought by the state to collect the taxes here at issue. Yet in order for appellee to avail itself of the remedy proposed by appellants, appellee would immediately subject itself to jurisdiction in New York, in the absence of a procedure such as a special appearance.

The district court in *United States Steel Corp.* v. *Multistate Tax Commission*, 367 F. Supp. 107, 116 (S.D.N.Y. 1973), refused to dismiss the complaint on the basis of Section 1341, partly because remedies proposed by the defendants would have required the plaintiffs to submit to audits by persons whose authority was questionable. To make appellee surrender all its defenses to the jurisdiction of New York's courts in order to obtain any relief is even more burdensome.

Appellee's alternative would be not to contest the New York assessment, but to interpose its constitutional jurisdictional objections when and if New York should seek to enforce its claims in Vermont. But the burdens of such an approach are clear. Not only would appellee's business suffer the consequences of the uncertainties surrounding the tax assessments for an extended period of time, (A.21-24), but appellee would lose forever its ability to challenge the amount of the taxes due, in the event its constitutional defenses should fail.

The district court held that appellee's limited contacts in New York state constituted a "counterweight to the reasons for requiring a taxpayer to raise his objections to an assessment in the courts of the taxing state." (A.50) This "counterweight", in the district court's analysis, requires a higher degree of assurance that the state's remedies are adequate than might be demanded in the case of the in-state challenger. This seems an appropriate balancing of the competing concerns at stake. While it might be perfectly reasonable federal policy to force those with a clearly established presence in a state to contend

with problems arising from indistinct remedies, there appears to be no good reason for imposing such burdens on those who have no established activities in the state.

II. The district court was correct in granting appellee's motion for a preliminary injunction.

If the district court was correct in determining that 28 U.S.C. §1341 does not require that this action be dismissed, there can be no question about the propriety of the issuance of a preliminary injunction. The only inquiry on appeal from the grant of an interlocutory injunction is whether the court below abused its discretion. *U.S.* v. *Corrick*, 298 U.S. 435, 437 (1936).

Appellee did not seek preliminary relief in the district court until the appellants, some three weeks after the action was commenced, caused to be issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due," running from August 1, 1965, and totalling $218,085.37 in taxes, penalties and interest. Under New York's taxing statutes, the issuance of the Notice begins a 90 day period within which an application for a hearing may be filed with the State Tax Commission, and at the end of which the amount becomes fixed and incontrovertible.

The issuance of the Notice represents the commencement of the entire tax collection proceeding, which may involve lawsuits, personal liability on the part of certain officers of appellee, seizure of property of appellee (such as trucks) which the appellants might happen to find within the boundaries of New York State, and similar activities.

In addition, the existence of the liabilities for an extended period of time represents a significant threat to appellee's ability to conduct its business in a normal manner during the pendency of the dispute, as was demonstrated by affidavits submitted in the district court proceeding.(A.21-23)

On the other hand, there has been no showing of, and it is difficult to imagine, any significant harm to appellants resulting from the delay pending a determination of appellee's claims. The common complaint against

enjoining state tax proceedings is that it interferes with the important state business of collecting revenues. In this case, however, the following exchange during the hearing before the three-judge court suggests that the current tax enforcement proceeding is not a revenue measure at all:

> MR. ZOLEZZI: In the present case the complaint was made to the New York State Department of Taxation by a local furniture merchant who says, "Merchants are coming into the state, they are selling articles and they are not charging tax. I have to charge tax which automatically makes my prices higher than theirs. Even if I was to charge the same amount, I have to charge tax and they are invading our area."
>
> Based on that, that's when the New York State Department of Taxation and Finance went out to investigate the complaint and, I seriously doubt that the Department of Taxation would hit every out of state merchant to determine whether he was making deliveries into the state.
>
> JUDGE OAKES: They would only hit those where there was a complaint by the local merchant?
>
> MR. ZOLEZZI: By the local merchant.
>
> JUDGE OAKES: Which might be great in number or small in number?
>
> MR. ZOLEZZI: It's possible. (A.32-33)

In *Miller Bros.* v. *Maryland*, 347 U.S. 340 (1954), this Court considered a situation nearly identical to that presented by this case. A Delaware furniture store made sales to residents of Maryland, who sometimes took their purchases with them, and sometimes had the store deliver the items by its own trucks or by common carrier. This Court upheld the contention of Miller Brothers that it was protected against the Maryland sales tax by the Commerce and Due Process Clauses.

In 1967 this Court, in *National Bellas Hess* v. *Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967), discussed *Miller Bros.* and other cases and, in

rejecting the argument of the State of Illinois, stated that in order to impose the tax on National Bellas Hess, it would have to:

> ...repudiate totally the sharp distinction which... [*Miller Bros.*]...and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a state, and those who do no more than communicate with customers within the state by mail or common carrier as part of a general interstate business. But this basic distinction, which has until now been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it. 386 U.S. at 758.

It is not necessary to pre-judge the ultimate disposition of this case on the merits to determine that, on the present state of the record, plaintiff's chances of success on the merits are sufficient to satisfy that traditional requirement for a preliminary injunction.

CONCLUSION

The remedies available to appellee should it be forced to litigate in New York are neither plain, speedy nor efficient. To require appellee to carry this fight into New York at all would require the surrender of important rights. The preliminary injunction is a necessary and reasonable measure to protect appellee during the litigation. The order of the district court should be affirmed in all respects.

Dated at Bennington, Vermont, May 6, 1976.

JOHN H. WILLIAMS, II
Attorney for Appellee
115 Elm Street
Bennington, Vermont 05201

R. PAUL WICKES

WILLIAMS & WICKES
115 Elm Street
Bennington, Vermont 05201

Of Counsel